

Chief Judge Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 HENRY ROSENAU, )  
 )  
 Defendant. )

NO. CR06-157MJP

**GOVERNMENT'S RENOTED  
MOTION FOR AUTHORIZATION  
TO DEPOSE FOREIGN  
WITNESSES**

**NOTED:** March 16, 2012  
No oral argument requested

The United States of America, by and through Jenny A. Durkan, United States Attorney for the Western District of Washington, and Susan M. Roe and Marc A. Perez, Assistant United States Attorneys for said District, renotes its previously renewed motion for an order granting leave to take depositions of essential witnesses in Canada. On November 9, 2011, the Government's motion for authorization to depose foreign witness was stricken but subject to renoting. Dkt # 54. The government renews its request for authorization to conduct witness depositions in Canada preparatory to this trial.

The government incorporates by this reference the two prior Motions filed in support of the depositions and adds the following.

***Status of MLAT Request for Canadian Evidence***

The Canadian Government has accepted the Mutual Legal Assistance Treaty request from the United States and is gathering Canadian evidence for use in

1 *United States v. Rosenau*, CR06-157. The Canadian government generally determines  
2 how the requested evidence comes to the United States and, pursuant to its direction, the  
3 MLAT contained a request to take depositions in Canada of two civilian witnesses who  
4 have significant information about the criminal conduct. The witnesses are both co-  
5 conspirators who previously entered guilty pleas, served their U.S. prison terms, and  
6 returned to Canada. One, Kip Whelpley, has been willing to return to the United States to  
7 testify but has been subject to legal impediments arranged by the defendant. Even if the  
8 current impediment is removed, neither the Canadian government nor the United States  
9 government can assure this Court that there will be no new legal maneuvers instigated by  
10 the defendant, his agents and lawyers. At this time, Justice Canada cannot guarantee that  
11 Mr. Whelpley will return to the United States to give his evidence. The other witness,  
12 Zachary Miraback, has firmly indicated he will not voluntarily return to the United States  
13 to testify. He is, of course, beyond this Court's subpoena power.

14 This office has been contacted by Crown Counsel to arrange depositions, in  
15 Canada, of the two witnesses. Canada refuses to allow the defendant to personally attend  
16 the depositions in Canada, but will facilitate his participation by video-link. That is, the  
17 depositions would take place in a Canadian courtroom. The witness, counsel for the  
18 government, counsel for the defendant, and the case agent will be physically present. The  
19 defendant will attend via video-conferencing and there will be private communication  
20 between the defendant and his lawyer as required. The government will provide a court  
21 reporter/videographer who will preserve the testimony for future use. The defendant may  
22 be clothed in civilian clothes. This office has contacted Bureau of Prisons and the FDC  
23 regarding local arrangements. Such arrangements have been previously approved by the  
24 courts and the depositions conducted successfully, such as in *United States v. Gianis*,  
25 WDMA, CR04-334.

26 ***Law Relevant to the Motion and Argument***

27 Federal Rule of Criminal Procedure 15 sets forth the procedure for taking  
28 depositions of witnesses under certain circumstances. Rule 15(a)(1) provides:

1 A party may move that a prospective witness be deposed in order to  
 2 preserve testimony for trial. The court may grant the motion because of  
 3 exceptional circumstances and in the interest of justice. If the court orders  
 4 the deposition to be taken, it may also require the deponent to produce at the  
 deposition, any designated book, paper, document, record, recording, or  
 data.

5 The deposition may be used as evidence at a trial in accordance with Federal Rules  
 6 of Evidence. *See* Rule 15(f). Rule 15(e) addresses the manner of taking the deposition.

7 Whether the court grants the motion to depose witnesses in a criminal matter is  
 8 discretionary, however the standard for allowing the deposition is whether doing so  
 9 would further “the interests of justice.” There is no necessity that a witness be  
 10 unavailable or that his testimony be essential. In *United States v. Omene*, 143 F. 3d 1167,  
 11 1170 (9th Cir. 1998), the court noted:

12 Rule 15(a) does not require any conclusive showing of “unavailability” or  
 13 “material testimony” before a deposition can be taken in a criminal case.  
 14 Rule 15(a) only requires that the trial court find that due to exceptional  
 15 circumstances it is in the interest of justice that the testimony of a  
 prospective witness be taken and preserved for possible use at trial. *Omene*,  
 at 1170.

16 Courts have approved Rule 15 depositions even when the defendant is not  
 17 physically present. In *United States v. Medjuck*, 156 F.3d 916 (9th Cir. 1998), as here, the  
 18 defendant was engaged in international drug smuggling. Civilian witnesses, as here, were  
 19 in Canada, beyond the subpoena power of the United States and unavailable for trial. The  
 20 *Medjuck* court affirmed the validity of the videotaped depositions and the use, at trial, of  
 21 the videotaped testimony, over the defendant’s objections. *See, United States v. Gifford*,  
 22 892 F. 2d 263, 265 (3rd Cir. 1989); *United States v. Salim*, 855 F. 2d 944, 950 (2nd Cir.  
 23 1988).

#### 24 ***Facts Relevant to the Motion***

##### 25 ***Re: Kip Whelpley***

26 Mr. Whelpley has indicated his willingness to testify but currently is legally  
 27 prevented from entering the United States to testify by a court order entered by default in  
 28 *Rosenau v. Whelpley*, 14781 Quesnal Registry, Supreme Court of British Columbia. The

undersigned has consulted with personnel at the Office of International Affairs and the Office of Foreign Litigation, Civil Division, at Main Justice, Washington, D.C., regarding the effectiveness of the order and possible remedies. The Order does not, on its face, prevent the witness from testifying but does prevent him from doing so in the United States. Therefore, the government asks that his testimony be taken by way of a deposition in Canada which would allow the testimony without violation of that order. Mr. Whelpley is willing to be deposed in Canada.

Moreover, assuming the Canadian Court issues a Sending Order which includes directing the deposition of Mr. Whelpley, he then will be complying with a Court Order when he appears and testifies. This Court's authorization of the deposition will show respect for Canadian court orders, protect Mr. Whelpley, and obtain his necessary and probative testimony.

Mr. Whelpley's anticipated testimony encompasses nearly all of Mr. Rosenau's charged criminal conduct in that he will testify regarding his work with Rosenau and others involved in smuggling contraband across the British Columbia-Washington State border during 2004 and 2005; that he accompanied Mr. Rosenau on trips; that he received multiple loads of marijuana from Mr. Rosenau; that Mr. Rosenau held his money; and that he continued to assist Mr. Rosenau in the smuggling operation in Canada even after his June 9, 2005, arrest in the United States. Additionally, he will testify about the role of other co-conspirators, including Jonathan Senecal. Lastly he will testify specifically as to some of the helicopters and locations involved in the smuggling. Mr. Whelpley's testimony is relevant as he knew, worked with, and flew with Rosenau during the helicopter smuggling. His testimony directly inculpates Rosenau.

***Re: Zachary Miraback***

Zachary Miraback signed and affirmed a Plea Agreement on November 28, 2005, admitting his smuggling activities, and provided sworn testimony to a federal grand jury on his drug smuggling and Rosenau's role as the pilot. On May 9, 2006, Mr. Miraback agreed, in a signed court document and pursuant to his plea agreement, to cooperate fully

1 with law enforcement authorities investigation of narcotics trafficking and other crimes,  
2 to answer any and all questions concerning his knowledge of such criminal activity, and  
3 to testify fully and truthfully at any trials in this matter. All of his sworn statements were  
4 made with advice of legal counsel.

5 Mr. Miraback was a willing witness when in the United States and his anticipated  
6 testimony was submitted as part of the government's Record of the Case in the Rosenau  
7 Extradition request. After his return to Canada, Mr. Miraback became unresponsive to  
8 requests to contact or return to the United States to testify. In 2009, the United States  
9 supplemented the Record of the Case in the Rosenau Extradition request, acknowledging  
10 that Mr. Miraback was not then cooperating with the United States.

11 Mr. Miraback has been located in Canada, remains rather uncooperative with the  
12 United States, and is beyond the subpoena power of the Court. The United States moves  
13 to depose him in Canada so that his trial testimony may be obtained via a deposition,  
14 thereby allowing him to fulfill the requirements of his plea agreement and his criminal  
15 justice sentence. Mr. Miraback is expected to testify, as he did before a federal grand  
16 jury, regarding his activities on September 21, 2005, when he received 1,100 pounds of  
17 marijuana from Rosenau who made two flights that day into Washington State flying a  
18 Robinson helicopter, tail identifier C-FRKM. Mr. Miraback further is expected to testify  
19 regarding the transportation, with the help of his brother, of the 1,100 pounds of  
20 marijuana across Washington State until their arrest in Puyallup, Washington, where the  
21 marijuana was seized. He is expected to testify regarding the two cars he and his brother  
22 drove in tandem that day, a white van and a red Toyota Tundra, Colorado license 900  
23 JLF, as they transported the marijuana. Further, Mr. Miraback is expected to testify  
24 regarding the prior loads of smuggled marijuana he had received.

25 ***CONCLUSION***

26 The government renotes its motion for a deposition of Mr. Whelpley and includes  
27 the motion for the deposition of Mr. Miraback. They are substantive and important fact  
28 witnesses in this trial. The facts and circumstances surrounding these particular

witnesses, as noted above, are compelling reasons for the Court to authorize depositions of these two witnesses.

The government would absorb the costs associated with the deposition of Zachary Miraback and will arrange for and pay the costs associated with the deposition of Kip Whelpley. However, the government moves this Court for an order assessing the costs associated with Mr. Whelpley's deposition to the defendant. These costs will only be incurred as a result of his harassment of a witness. These are not usual and appropriate costs associated with the government preparing or presenting its case and the taxpayers should not absorb the cost.

The Canadian government has suggested dates in late March for the depositions in Canada. The details would be finalized once the Sending Order issues and the depositions are authorized, including modifying the dates if necessary.

DATED this 2nd day of March, 2012.

Respectfully submitted,

JENNY A. DURKAN  
United States Attorney

s/Susan M. Roe  
SUSAN M. ROE  
Assistant United States Attorney  
United States Attorney's Office  
700 Stewart Street, Suite 5220  
Seattle, WA 98101-1271  
Telephone: (206) 553-1077  
Fax: (206) 553-0755  
E-mail: susan.roe@usdoj.gov

s/Marc A. Perez  
Marc A. Perez  
United States Attorney's Office  
1201 Pacific Avenue, Suite 700  
Tacoma, Washington 98402  
Telephone: (253) 428-3822  
Fax: (253) 428-3826  
Email: Marc.Perez@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney of record for the defendant.

*s/ Kathleen M. McElroy*  
KATHLEEN M. McELROY  
Paralegal Specialist  
United States Attorney's Office  
700 Stewart, Suite 5220  
Seattle, Washington 98101-1271  
Phone: 206-553-7970  
Fax: 206-553-0755  
E-mail: Katie.McElroy@usdoj.gov